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Rapporteur: Mr. Peter Kabatsi

Chapter IV

STATE RESPONSIBILITY

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CHAPTER IV

STATE RESPONSIBILITY

A. Introduction

1. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mis en oeuvre) of international responsibility. 1/

2. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 2/

3. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles, on "the content, forms and degrees of international responsibility".

4. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from the previous Special Rapporteur, Mr. Willem Riphagen, 3/ with reference to Parts Two and Three of the draft articles. From that time on, the Commission assumed that a Part Three on the

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1/ Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

2/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

3/ For the seven reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330; Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334; Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354; Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366; and Add.1; Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380; Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397; and Add.1.

settlement of disputes and the implementation (mise en oeuvre) of international responsibility would be included in the draft articles.

5. The Commission, from its fortieth (1988) to forty-fifth (1993) sessions, received five reports 4/ from the current Special Rapporteur 5/, Mr. Gaetano Arangio-Ruiz.

6. At the conclusion of its forty-fifth session, the Commission had provisionally adopted for inclusion in Part Two of the draft articles articles 1 to 5, 6/ and articles 6 (Cessation of wrongful conduct), 6bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10bis (Guarantees of non-repetition). 7/ It had furthermore, received from the Drafting Committee draft articles 11 (Countermeasures by an injured State), 12 (Conditions relating to resort to countermeasures), 13 (Proportionality) and 14 (Prohibited countermeasures) as adopted on first reading by the Committee. 8/ Finally, it had referred to the Drafting Committee draft articles 1 to 6 of Part Three (and an Annex thereto)

4/ For the five reports of the Special Rapporteur, see Yearbook ... 1986, vol. II, Part One, p. 6, document A/CN.4/416 and Add.1; Yearbook ... 1990, vol. II, Part One, document A/CN.4/425 and Add.1; Yearbook ... 1991, vol. II, Part One, document A/CN.4/440 and Add.1; document A/CN.444 and Add.1-3; and document A/CN.4/L.453 and Add.1 and Corr.1, 2 and 3 and Add.2 and 3.

5/ The current Special Rapporteur was appointed at the thirty-ninth session in 1987.

6/ For the text of articles 1 to 5 (para. 1), with commentaries, see Yearbook ... 1985, vol. II, Part Two, pp. 24 et seq.

7/ For the text of article 5, paragraph 2 and articles 6, 6bis, 7, 8, 10 and 10bis, with commentaries, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 132 et seq.

8/ See document A/CN.4/L.480 and Corr.1 (French only) and Add.1.

The provisions in question were introduced by the Chairman of the Drafting Committee at the 2318th meeting of the Commission but action thereon was deferred to the next session, in line with the Commission's policy of not adopting articles not accompanied by commentaries.

concerning dispute settlement procedures, 9/ which are currently pending before the Drafting Committee, together with the proposals of the previous Special Rapporteur on the same subject. 10/

B. Consideration of the topic at the present session

7. At the present session, the Commission had before it Chapter II of the fifth report of the Special Rapporteur (A/CN.4/453/Add.2 and 3) and his sixth report (A/CN.4/461 and Add.1 and 2). The reports dealt on the one hand with the question of the consequences of acts characterized as crimes under article 19 of Part One of the draft articles and on the other hand with an appraisal of the pre-countermeasures dispute settlement provisions so far envisaged for the draft articles. The present section has been organized accordingly.

1. The question of the consequences of acts characterized as crimes under article 19 of Part One of the draft articles

8. The Commission had before it Chapter II of the Special Rapporteur's fifth report (A/CN.4/453/Add.2 and 3), which had been introduced at the previous session, 11/ and Chapter III of his sixth report (A/CN.4/461/Add.1). It considered those documents at its 2339th to 2343rd and 2348th meeting held between 17 May and 15 June 1994.

9. After completing its consideration of the above documents, the Commission heard the conclusions of the Special Rapporteur, for which it thanked him. 12/ It took note of his intention to present at the next session articles or

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9/ For the text of draft articles 1 to 6 of Part Three and the Annex thereto submitted by the current Special Rapporteur, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 102 et seq., notes 74, 75, 76, 77, 78 and 79.

10/ For the text of draft articles 1 to 5 of Part Three and the Annex thereto as submitted by the previous Special Rapporteur, see Yearbook ... 1986, vol. II, Part Two, p. 35, note 86. Those provisions were referred to the Drafting Committee at the thirty-eighth (1986) session.

11/ See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), paras. 283 to 333.

12/ See paras. 103 to 120 below.

paragraphs on the matter under discussion to be included in Parts Two and Three. It also noted that the Special Rapporteur intended to

proceed in such a way as to enable the Commission to conclude the first reading of the draft by the end of the current term of office of its members.

10. The comments and observations of members of the Commission on the question of the consequences of acts characterized as crimes under article 19 of Part One of the draft and on the topic of State responsibility in general are reflected in paragraphs 11 to 102 below.

11. Many members emphasized the complexity of the problems at stake which, it was observed, called for a reflection on the sensitive and crucial notions of international community, inter-State systems, fault and criminal responsibility of States, as well as on the functions and powers of United Nations organs. Appreciation was expressed to the Special Rapporteur for his learned and valuable contribution to the study of those problems despite what was termed the relative prudence and even modesty of his proposals. Chapter III of his sixth report, in which the different issues raised by the distinction between crimes and delicts were presented in the form of a questionnaire, was viewed as particularly useful and as setting a precedent that ought to be repeated.

(a) The distinction between crimes and delicts as embodied in article 19 of Part One of the draft articles

(i) The concept of crime

12. According to one body of opinion, the concept of crime posed no conceptual difficulties and the distinction between crimes and delicts reflected a qualitative difference between basic infringements of the international public order and ordinary delicts which did not threaten the fundamental premise upon which international society was based, namely the coexistence of sovereign States: that difference was, it was said, a basic fact of international life inasmuch as a breach of an air transport agreement and aggression, or the violation by police officials of the human rights of a foreigner and an act of genocide, were manifestly incommensurate. The remark was also made that the difference between the two categories of internationally wrongful acts had been recognized in article 19, which had been drafted with great care and adopted unopposed by the Commission in 1976 after lengthy discussion, and that it would be inadvisable to question it further.

13. Another body of opinion queried the existence of such a thing as a category of State crimes. The remark was made that the many internationally wrongful acts

which could be attributed to a State varied in magnitude depending on the subject matter of the obligation breached, the significance the international community attached to the obligation, the bilateral or other scope of the obligation and the circumstances in which the breach of the obligation occurred and that where the wrongful act involved injury to person or damage to property on a scale large enough to bestir the conscience of humanity, the use of the word "crime" was usual in day to day parlance as well as in other political and other legal contexts. Against this background, a clear-cut distinction between crimes and delicts was viewed as questionable. The proposed distinction between categories of internationally wrongful acts was also considered as irrelevant to the extent that it did not appear to find reflection in their respective consequences.

14. Some members observed that while it was possible to argue in favour of a continuum within a single regime of responsibility extending from minor breaches at one end of the spectrum to exceptionally serious breaches at the other end, a continuum marked by an essentially quantitative difference, the debate between the proponents of the continuum theory and those who wished the draft to include a distinct category for exceptionally serious wrongful acts was likely to be never-ending, since quantitative differences could, beyond a certain threshold, turn into qualitative ones.

(ii) The question of the legal and political basis of the concept of crime

15. According to one body of opinion, the concept of crime was rooted in positive law and in the realities of international life. The concept was viewed as having a self-evident political foundation since contemporary history was full of examples of crimes directly or indirectly imputable to the State. It was furthermore described as falling within lex lata inasmuch as some acts, such as genocide and aggression, were regarded by the international community as a whole as violating its fundamental rights or, in the case of genocide or apartheid, were characterized as criminal in international conventions. It was also said that, in general terms, the components of an international crime emerged from jurisprudence, the practice of States and the rulings of international tribunals. Reference was made in this context to the work of the Nürnberg and Tokyo Tribunals and to the judgment of the International Court of Justice in the

Barcelona Traction case. 13/ With reference to that judgment, attention was drawn to the difference between a crime and a violation of an obligation erga omnes: it was pointed out that the Court had not confined itself to speaking of obligations erga omnes, but had emphasized "the importance of the rights involved", thereby signifying that it had in mind particularly serious violations (the examples given being aggression, genocide, and the infringement of the basic rights of the human person) and not ordinary delicts as would be, for example, the infringement of the right of transit passage through an international strait, although they, too, placed an erga omnes obligation on the coastal State. Some members, while being of the view that the concept of State crime did not exist in lex lata, expressed their readiness, albeit not without certain reservations, to acknowledge that certain acts which could be committed only by States should be characterized as crimes. A note of caution was however struck in this respect, on the ground that if the Commission ventured into the area of lex ferenda, it would be opening a Pandora's box of options that would be difficult to circumscribe.

16. According to another body of opinion, the concept of crime was not lex lata because there was no instrument making it an obligation for States to accept it. The arguments in favour of the concept derived from the jus cogens provisions of the Vienna Convention on the Law of the Treaties were viewed as unconvincing: first, because the fact that a contract or a treaty concluded contra bonos mores or jus cogens was unenforceable or void ab initio did not necessarily mean that the act or instrument was characterized as criminal; and secondly, because the inclusion of the notion of jus cogens in the 1969 Convention had been conditional on acceptance of the jurisdiction of the ICJ. Equally unconvincing were, it was stated, the arguments derived from the ICJ advisory opinion on the Reservations to the Genocide Convention 14/ (which merely suggested that certain provisions of the Convention had become an integral part of international law) or from the Barcelona Traction case, bearing in mind that recognition of the concept of

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13/ Barcelona Traction, Light and Power Company, Limited, judgment, I.C.J. Reports 1970, p. 32.

14/ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

violation erga omnes was not tantamount to recognizing the existence of a new, qualitatively different, category of acts contra legem or to questioning the distinction between civil responsibility and criminal responsibility. The remark was further made that no issue of criminal responsibility of States arose in the documents relating to the capitulation of Germany and Japan or in the 1977 Protocols to the Geneva Conventions. Further arguments included (1) the observation that a number of States had expressly rejected the concept of crime as devoid of basis in the lex lata so that the introduction of the proposed distinction might tend to detract from, rather than enhance, the possibility of the widest possible acceptance of the draft; and (2) the remark that the creation de lege ferenda of categories of violations of different kinds would undermine the effectiveness of the concept of violation erga omnes.

(iii) The type of responsibility entailed by breaches characterized as crimes in article 19 of Part One of the draft articles

17. The question whether a State could incur criminal responsibility gave rise to different views.

18. According to some members, the criminalization of States should be abandoned, since a State could not be placed on the same footing as its Government or the handful of persons who, at a given moment, might be in charge of its affairs. For those members, crimes were committed by individuals who used the State's territory and resources to commit international delinquencies for their own criminal purposes. Attention was drawn in this context to the mens rea requirement - a requirement which, it was stated, should be distinguished from the procedure for the attribution of responsibility, namely, the legal fiction whereby, for purposes of ensuring adequate compensation for damage caused, a superior was not permitted to escape responsibility for compensation; it was not possible to attribute the mens rea of one individual to another, still less of one individual to a legal entity such as a State. Reference was furthermore made to the maxim "societas delinquere non potest" according to which a State, including its people as a whole, could not be a subject of criminal law and the view was expressed that, under criminal law principles, it was questionable whether an administrative organ, as a legal person, could be so regarded. It was pointed out, in this connection, that many positive laws made no provision concerning the guilt of legal persons or for corresponding penalties. Further

comments included (1) the remark that the requirements of the maxim nullum crimen nulla poena sine lege (namely, first, the existence of definitive norms and objective criteria for determining whether a delict amounted to a crime and, second, penalties having the characteristics of punishment under criminal law) were not met at the present stage and (2) the observation that if the concept of State crime were to be accepted, the position of the State would be undermined - a result which a realistically-minded international community would find difficult to accept.

19. The attribution of a criminal responsibility to a State was furthermore viewed as inconceivable in the absence of a legal organ to try and punish States. It was pointed out in this connection that the jurisdiction of the International Court of Justice - the only permanent judicial organ for the settlement of disputes in the international community - was based on voluntary acceptance and that the Security Council had mainly policing powers which were in no way those of a court of justice.

20. Concern was also expressed that the attribution of a criminal responsibility to a State cast the shadow of criminality over the entire people of a State and might result in collective punishment. 15/

21. In the view of other members, the idea of State responsibility for crimes posed no conceptual difficulties: it was perfectly possible to envisage a concept equivalent to mens rea in the case of acts imputable to States. The remark was made in this context that, while criminal responsibility was primarily individual, as a result of advances in the law it could also be collective and that recognition of the criminal responsibility of a legal person in certain conditions and circumstances was more a step forward for the law than a step backward, as evidence by recent developments in the legal systems of certain countries. It was remarked in this connection that the maxim societas delinquere non potest had fewer and fewer supporters, particularly in view of economic and financial crime such as money laundering; in such a case, the most serious criminal conduct of States called for an appropriate policy of sanctions, the nature of which, albeit punitive, could not be afflictive, as in the case of

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15/ Views on this issue are reflected in more detail in the subsection devoted to the consequences of crimes (see paras. 66 to 72 below).

individuals guilty of crimes. Attention was drawn in this respect to the political measures (enumerated in paragraph 66 below) of which a State author of a crime might be the object.

22. It was also said that, today, a State could cause such damage to the international community as a whole that a society should not be allowed to shift the responsibility for crimes committed in its name onto mere individuals, and that the concept of State crime should therefore be accepted, even if the collective sanctions against the State in question to which that crime might lead could well be prejudicial to its entire population and not only its leaders. 16/ History, it was added, provided examples of criminal States and there was no reason not to say it loud and clear.

23. Still other members, while agreeing that the question of the criminal responsibility of the State was extremely delicate and raised in particular the problem of collective responsibility, were of the opinion that the divergence of views reflected above was irrelevant in the present context, since the Commission had not sought in 1976 to establish the criminal responsibility of the State and the use of the term "crime" in no way prejudged the question of the content of responsibility for an international crime. The remark was made in this context that State responsibility in international law was neither criminal nor civil: it was very simply, international, different and specific. Its specificity was revealed, for instance, in the fact that some internationally wrongful acts, instead of entailing the responsibility of the State alone, also entailed the individual responsibility of their perpetrators, who could not hide behind the immunities conferred on them by their functions.

(iv) The need for the concept of crime - Possible alternative approaches

24. According to one view, the concept of crime had a fundamental use, that of freeing the rules on State responsibility from the strait-jacket of bilateralism and, in the case of particularly serious acts, enabling the international community, acting either within the framework of institutions or through individual States, to intervene in order to defend the rights and interests of the victim State. The remark was made in this connection that, in the case of an international crime, the victim was the community of States as a distinct legal

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16/ Id.

entity and that the concept of international crime helped to promote the international community to the status of, as it were, a quasi-public legal authority.

25. According to another view, the crime-delict distinction was neither necessary nor appropriate in the draft articles on State responsibility, the purpose of which was not to punish States but to require them to compensate for damage caused. The remark was made that, if it was deemed necessary to free the international community from the yoke of bilateralism, the concept of international crime was neither necessary nor sufficient: it was not necessary because there was no justification for going so far as the idea of the punitive result inevitably connected with the idea of a crime and it was not sufficient because it failed to settle the issue of the category of erga omnes violations as a whole. It was also stated that the concerns underlying the concept of State crime had lost much of their relevance since 1976 with the end of the cold war, the slackening of North-South tensions and the retreat of apartheid and colonialism.

26. Some members queried the need to use any descriptive term at all to meet the concerns underlying article 19. Thus the remark was made that distinguishing between degrees of gravity meant making a distinction on the basis of fault - a concept which, it was said, should not have been abandoned in the case of delicts and had a fundamental role to play in the case of crimes.

27. Another approach which was advocated was to introduce the concept of jus cogens obligations into the draft and to distinguish a breach of a jus cogens obligation from other lesser international wrongful acts - an approach which would merely require (a) to follow closely the language of the jus cogens provision in article 53 of the Vienna Convention on the Law of Treaties (without using any accompanying descriptive term and without introducing any illustrative list of examples for which there might not be adequate lex lata support) and (b) to indicate what remedies a breach of a jus cogens type of obligation would entail, in addition to those required for other wrongful acts. Some members, while recognizing that this was a tempting approach, pointed out that, whereas all crimes were violations of rules of jus cogens, the contrary did not hold:

pacta sunt servanda, it was stated, could be viewed as a jus cogens norm, but not all violations of pact sunt servanda were crimes.

28. A further possibility was, in the view of some members, to elaborate the consequences of breaches of erga omnes obligations and thereby free the draft articles from the yoke of bilateralism. Doubts were however expressed on this approach on the ground that not all erga omnes obligations were so essential to the international community that their violation could be treated systematically as a crime.

29. Attention was finally drawn to the possibility of dealing with the issue from the standpoint of State responsibility for international delinquencies on the one hand and of the criminal responsibility of individuals for crimes on the other. Reference was made in this context to article 5 of the draft Code of Crimes against the Peace and Security of Mankind as adopted on first reading, which provided that prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it.

(v) The definition contained in article 19 of Part One of the draft articles

30. Some members found the article unsatisfactory. It was said in particular that the text was too general and did not propose a real definition of crimes; that it stressed the degree of gravity of the act which was characterized as a crime but did not define the threshold of gravity at which a delict became a crime; that it spoke of an obligation that was essential without defining those terms; and that it took no account of wilful intent or of the concept of fault, even though, it was said, that was inseparable from the concept of crime. Concern was also expressed that, as it now stood and bearing in mind its history, article 19 implied that a State had to continue to suffer the legal consequences of an international crime committed earlier even if the political, social or human circumstances in which that international crime had been committed had ceased to exist.

31. Other members felt that the current wording adequately expressed the underlying intention which was to make it clear that, most breaches could be dealt with in the bilateral relationship between the two States directly involved, while others were of such gravity that they affected the entire

international community. In their opinion, the article had rightly been drafted in general terms. The remark was made in this connection that the draft articles were dedicated exclusively to secondary rules, that consequently the principle nullum crimen sine lege did not apply in the present context and that the definition of the various crimes must be left to other instruments. It was also pointed out that the concept of international crime was evolutive and that a flexible formulation adaptable to possible enlargements of the category of crimes was desirable; reference was made in this context to the formula defining the competence of the Security Council. While some of the members in question found merit in the current structure of article 19 (a general clause and a non-exhaustive list), others felt that the list of examples should be transferred to the commentary.

32. As regards paragraph 2, some members said that it correctly reflected the three main criteria to be applied in defining a crime, namely (1) a breach involving fundamental interests of the international community and therefore going beyond the framework of bilateral relations; (2) a breach which was serious in both quantitative and qualitative terms; and (3) recognition by the international community that the breach was a crime, which recognition must be inferred from experience and practice. With reference to the argument that the formulation was tautological, it was pointed out that the same remark could be made about the definition of jus cogens or the universally accepted definition of custom (i.e. a general practice accepted as law). Along the same lines, the remark was made that the subjective criterion which derived from the fact that the violation was "recognized" as a crime was no more open to question than the criterion of recognition by civilized nations of the general principles as referred to in article 38 of the Statute of the International Court of Justice, and that the concept of crimes "recognized" by the international community as a whole was spelt out in the enumeration given in paragraph 3.

33. Other members pointed out that the elaborate language of paragraph 2, which stemmed in large part from the terminology of the compromise jus cogens provisions of article 53 of the Vienna Convention on the Law of Treaties was rather circuitous. With reference to the requirement that the breach be recognized as a crime by the international community, the remark was made that

criminal law was steeped in subjectivity: the reprobation aroused in the public conscience by the commission of an act, no matter how heinous, was never uniform, even in a national society sharing the same values, and in a culturally heterogeneous international society, the element of subjectivity was even more marked. Thus, it was stated, the question might be asked, if only from a moral point of view, why a "small aggression" which caused relatively minor destruction of property and the death of few innocent people should entail additional consequences in terms of authorized armed countermeasures when such countermeasures would presumably not be allowed in the case of a wide-scale genocide.

34. As regards paragraph 3, some members took the view that the list contained therein was still satisfactory, subject to a review of paragraph 3 (d), which was described as controversial, and subject to some drafting changes in paragraph 3 (b) to bring the text into line with the reality of modern international relations, especially after the end of colonialism. On the former point, the remark was made that the case contemplated in subparagraph (d) was somewhat unrealistic, as it was difficult to believe that pollution of the atmosphere or the seas could extend to mankind as a whole without any measure being taken, if only at the regional level; furthermore, it was added, defining pollution of the atmosphere or of the seas as a crime was somewhat premature, considering that acts of transboundary pollution were only just beginning to be regarded as internationally wrongful acts. While some of the members in question invited the Commission to resist attempts at expanding the list of crimes, there was also a view that crimes related to drug trafficking should be included therein.

35. Paragraph 3 was viewed by other members as defective in a number of ways. It was in particular viewed as encroaching on the distinction between primary and secondary rules, as reflecting a questionable legal technique since it gave examples which really belonged in the commentary and as likely to quickly become outdated since the list it contained was subject to the changing views of times. Reference was made in this context to paragraph 3 (b). A further remark was that the text did not actually say what it appeared to say: it appeared to say that the matters listed and examples given actually constituted State crimes; since, however, it was prefaced by the phrase "Subject to paragraph 2, and on the basis

of the rules of international law in force", the test provided for in paragraph 2 still had to be applied and the rules of international law in force still had to be determined. Attention was also drawn to the difficulty involved in establishing a non-exhaustive list which none the less set out a number of categories.

36. Some members observed that the term "crime" might be an unnecessary source of difficulties because of its penal law connotations and suggested to replace it by a more neutral phrase such as "violation of an extreme gravity", "internationally wrongful act of a particular gravity", "very serious international delict" or "internationally wrongful act of an extreme gravity".

37. While not pressing for the term "crime" to be maintained at any price, some members expressed doubts on the suggested terminological changes. It was pointed out that the term "crime" had the psychological advantage of stressing the exceptional seriousness of the breach concerned and might have a deterrent effect on the conduct of States. The remark was also made that the word had a tradition since it had been used for example in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and had been preferred over the term "offences" in the draft Code of Crimes against the Peace and Security of Mankind. While it was recognized that the point at issue in the draft Code was the criminal responsibility of individuals, not States, emphasis was placed on the fact that conduct which would be labelled criminal under the Code corresponded closely, ratione materiae, to breaches of obligations in the present draft which had been termed international crimes. Doubts were therefore expressed on the advisability of replacing the term "international crimes" by the more serpentine and more obscure term "exceptionally serious wrongful acts", or variants thereof.

38. Several members remarked that a terminological change would not bridge the gap between those for whom internationally wrongful acts were part of a continuum and those for whom the crime-delict distinction was intended to convey a difference of species.

(b) Issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes

(i) Who determines that a crime has been committed?

39. Some members expressed the view that the question who would be responsible for determining that a crime had been committed was of fundamental importance in instituting a regime of international responsibility for crimes. The Commission, it was stated, faced a virtually insuperable difficulty in that a body with responsibility for determining whether, on the facts, a State had indeed committed a crime would be central to such a regime.

40. Other members pointed out that the problem, however serious, also arose in the case of ordinary delicts - something which had not prevented the Commission from elaborating a regime of responsibility for delicts. The remark was also made that the question of who determined that a crime had been committed was irrelevant in the context of Part Two of the draft and fell solely in Part Three.

41. Some members observed that, in dealing with this question, one could not ignore the present imperfect state of international society. While it was recognized that alongside the "relational society", based on coordination between entities that were legally equal, a more progressive constitution of the international community had evolved, and while emphasis was placed on the positive role played by the General Assembly, the Security Council and the ICJ, the present organization of the international community was viewed as providing no alternative but to leave it to each State to determine whether a crime had been committed. While this state of affairs was considered by the members in question as far from ideal, some among them drew attention to the existence of safety nets. It was pointed out in particular that any State which decided that an international crime had been committed did so at its own risk and that such a decision could always be challenged by the accused party.

42. Other members found it difficult to accept, except in the case of self-defence, 17/ that it should be left to each State, including the victim State, to determine whether a crime had been committed, bearing in mind the nemo judex principle. They deemed it indispensable that this prerogative should be reserved for an international judicial body, impartial and independent. It was

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17/ Emphasis was placed in this context on the need to get around the concept of self-defence through substantive, formal and procedural rules to be determined in the light of the resolutions of the United Nations, the Charter and the entire set of customary and conventional rules.

suggested that this fundamental principle be included in one form or another in the draft articles. It was also proposed that a system should be devised whereby the existence of a crime would be determined by a body representing the international community, which might for example be the group of States parties to the future convention on State responsibility.

43. This approach was viewed as unrealistic by some members, who warned the Commission not to be tempted into undertaking the task of paramount political importance of defining a new layer of worldwide institutions responsible for issues of State responsibility. Doubts were expressed on the possibility of establishing in a foreseeable future a judicial body with widely accepted jurisdiction to which cases would be uniformly referred and which would make its determination on the basis of a consistent body of jurisprudence.

44. The role of United Nations organs in this area is discussed in paragraphs 73 to 91 below.

(ii) The possible consequences of a determination of crime

a. Substantive consequences

45. According to the prevailing opinion, the distinction between delicts and crimes had a qualitative impact on the substantive consequences of the two categories of internationally wrongful acts inasmuch as the latter entailed a violation of a norm essential for the protection of fundamental interests of the international community. There was however also a view to the contrary (see para. 47 below).

46. As regards remedies available to the State victim of a crime, no difference between delicts and crimes was identified as far as cessation is concerned.

47. On reparation lato sensu, positions differed. According to one view, the crime/delict distinction was irrelevant and the examples to the contrary given by the Special Rapporteur were unconvincing as they involved either cessation, or guarantees of non-repetition, or the exercise by the Security Council of its responsibility in the maintenance of international peace and security or, in the case of territorial amputations, a violation of the norms of contemporary international law on territorial integrity, self-determination and human rights; the crime/delict distinction was also described as irrelevant as regards the ban on demands that would impair the dignity of the State concerned because there

could be no greater infringement of the dignity of the State than that of the conviction and punishment of its leaders, already envisaged in article 10. The prevailing opinion was however that the substantive consequences of crimes as far as reparation and satisfaction was concerned were qualitatively different from those of delicts.

48. With respect to restitution in kind, several members expressed the view that crimes should be excluded from the sphere of application of the restrictions contemplated in article 7 (c) and (d) because they were harmful to the international community as a whole and infringed a peremptory norm of international law. Some members on the other hand pointed out that the limitation of excessive onerousness should not be derogated from if the population of the criminal State was to be spared excessive suffering. The remark was further made that the choice between restitution in kind and compensation should not be available to the State victim of a crime unless restitution in kind was materially impossible or entailed a violation of jus cogens.

49. With respect to satisfaction comments focused on (1) trial of the responsible individuals, (2) demands which would impair the dignity of the State concerned and (3) punitive damages. Concerning the first aspect, the view was expressed that in the case of crimes, prosecution should be possible, contrary to the provisions of article 10, paragraph 2 in regard to delicts, without the consent of the author State. As for the ban on demands which would impair the dignity of the State concerned, the remark was made that it should not apply in the case of crimes since a State, in committing a crime, chose to humiliate itself and consequently need not be spared further humiliation. Punitive damages were viewed by some of the members who addressed the issue as a necessary element of any regime of reparation for crimes. Attention was however drawn to the significant problems which punitive damages posed, especially when the principal victim of the State crime was the population.

50. As regards claimants, reference was made to the eventuality of a plurality of injured States: such a situation, it was stated, called for coordination in the submission of claims and might require ad hoc procedures for the submission and consideration of claims.

51. Some members furthermore took the view that in the case of crimes, reparation was due not only to the State which was materially affected, but also, in a broader sense, to the international community. In this connection the remark was made that since there was still no organized international community, it was imperative that States should have the right to reparation not uti singuli but within the framework of some form of coordination between the States parties to the future instrument on responsibility. As to the suggestion that the General Assembly or the Security Council could seek a remedy on behalf of States, it was viewed as alien to the regime of the Charter. While the possibility of the General Assembly or Security Council seeking an advisory opinion was envisaged, the remark was made that in that case it would no longer be a question of a judicial remedy.

b. The instrumental consequences (countermeasures)

- The conditions of lawful resort to countermeasures in the case of crimes

52. Some members shared the Special Rapporteur's view that the faculté of resort to countermeasures should be subject to less stringent conditions in the case of crimes than in that of delicts. In particular it was considered excessive to require a State which believed it was the victim of a crime to accompany its reaction by an offer of peaceful settlement. Other members expressed a different opinion. One observation made was that, in a recent case, a number of States had adopted economic measures on their own before any attempt had been made to resolve the question by means of a dispute settlement mechanism and that, had there been no hasty condemnations and economic countermeasures, a peaceful but principled solution to the conflict might conceivably have been found.

53. The principle of proportionality was generally regarded by the members who addressed the issue as applicable to responses to crimes. According to one view, this meant that, in the area of countermeasures as in others, the crime/delict distinction was irrelevant. The remark was made that failure to apply the principle of proportionality in the case of crimes could mean that the State responsible for a crime was not treated as severely as it should be.

54. As regards prohibited countermeasures, the members who addressed the issue generally agreed on the need to strictly abide by the prohibition of the use of force and concern was expressed that further pretexts for use of force might be

added to those already invoked in the past. Emphasis was placed on the primacy of the Charter in this area. In this connection the remark was made that it was the Charter, and not the category of the crime, that would ultimately justify or invalidate forceful reaction and that, while the interpretation of the relevant Charter provisions was controversial, particularly with regard to humanitarian intervention, the category of crime involved had not been used as the decisive element whenever it had been determined that such intervention was permissible.

55. At a more general level, the view was expressed that individual reactions involving a violation of a jus cogens norm should be ruled out. The remark was made in this connection that recognition of the concept of crime did not mean recognition of an absolute and unlimited right of riposte or of lex talionis, and that the world had recently witnessed an intervention following on a crime where the intervention had never been legally recognized by the international community because, in order to put a stop to the crime, the victim State had in turn violated a peremptory rule of international law. 56. In this context, the view was expressed that the distinction to be drawn was not between countermeasures permissible in cases of crimes, on the one hand, and cases where there was no crime but breach of a jus cogens obligation, on the other; it was between countermeasures which were permissible under an applicable multilateral or even bilateral treaty regime (the Charter or otherwise) and cases where there was no applicable treaty prescribing what countermeasures could be taken in the event of a breach of an obligation or containing provisions on the peaceful settlement of disputes. Emphasis was placed on the need to provide, where no treaty regime applied, for some regulation of the countermeasures that might be taken in the case of a believed breach by a State of a multilateral obligation.

57. As for non-forcible countermeasures, the Special Rapporteur's opinion that they might be exacerbated compared with those applicable to delictual responsibility was viewed as correct despite the relative vagueness of his conclusions on this point.

58. The question whether the faculté of reaction to a crime extended to individual States other than the victim State was extensively discussed. There was a view that the question was irrelevant, as was also, in this respect as in others, the crime/delict distinction inasmuch as the problem of a plurality of

injured States could arise in relation to any internationally wrongful act irrespective of its seriousness. The prevailing opinion was however that the above mentioned question was a valid one, bearing in mind that a crime was, by definition, a violation of an erga omnes obligation which prejudiced the fundamental interests of the international community as a whole.

59. Some members warned that the position of "indirectly injured States" should not lightly be equated with that of the direct victim. The view was expressed in this connection that the commission of a crime did not confer on States other than the victim State the status of an injured State for the purpose of resort to countermeasures and that individual States other than the victim State could not intervene in riposte to a crime unless there was no collective reaction, lest the concept of crime led to the confirmation of existing power relationships. The faculté of reaction, it was said, should lie essentially with the international community. 18/ In this connection the recent trend toward elevating the concept of international community from the realm of abstraction or myth into that of lived experience and history was noted with satisfaction, as was also the growing role of non-governmental organizations in loosening the grip of the concept of national sovereignty in matters of elementary humanity.

60. Other members pointed out that the international community was ill-equipped to deal with international crimes of States and that at present there was no international body expressly empowered to react to all categories of international crimes, so that the reaction to a crime had to remain a matter for individual States to determine. While agreeing that the present state of affairs was far from satisfactory, some members observed that the prohibition of the use of force, the principle of peaceful settlement of disputes and the principle of proportionality provided guarantees against abuse.

61. The views expressed with regard to the possibility of creating new institutions responsible for determining whether a crime had been committed as reflected in paragraphs 42 and 43 above are also relevant in the present context.

62. Bearing in mind the non-existence of an institutional and procedural mechanism with competence to react to a crime on behalf of the international

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18/ Or more modestly, as one member put it, with the community of States parties to the future convention.

community, some members expressed the view that, as a substitute for truly collective action, authorization might be given in the proper form to third States not directly affected to take measures for the defence of the interests of the international community; in addition to the right to make representations, which they already enjoyed, they would have the faculté to take countermeasures, since the prohibition of the use of force served as a safeguard against a penalty being out of all proportion to the crime.

63. This idea was elaborated upon in relation to aggression and genocide.

64. As regards aggression, the view was expressed that, among the States not directly concerned, it was necessary to single out those that were linked to the victim State through a military alliance treaty under which any attack on one party was treated as an attack on the other. That kind of treaty raised the question of collective self-defence, of the conditions of form and substance and the instrumental circumstances in which it could be invoked under the Charter of the United Nations, and created the risk that collective self-defence might be invoked excessively so as to side-step the control of the international community or violate the rules of jus cogens. The other States, which had no legal ties with the victim State, did not of course, it was stated, have the right to invoke self-defence or use armed force in order to come to the aid of the victim; the use of armed force in that case must take place under the authority and control of the competent international bodies, in particular the Security Council. Also with reference to the relationship between self-defence and enforcement measures ordered at the international level, the remark was made that a State's action might conceivably coincide with international measures under Chapter VII of the Charter and that such coincidence could plausibly be interpreted to indicate that the actions of the United Nations necessarily affected the obligations of States in respect of international crimes of States. Yet, it was observed, that coincidence might be more fortuitous than the result of a conviction that the United Nations represented the organized community of nations.

65. With respect to genocide, the view was expressed that all States could react to a crime of genocide even if they were not directly affected and reference was made to the distinction drawn by the International Court of Justice in the Barcelona Traction case between the obligations of States towards the

international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. It was observed that the actio popularis principle whereby all States had a legal interest in protecting the rights involved could be of significant importance. Mention was made in this connection of the case concerning the application of the 1948 Convention on Genocide brought before the Court by Bosnia and Herzegovina in March 1993. Attention was drawn in this context to the distinction to be made between the case in which a State attacked its own population and that in which the genocide was perpetrated not only against the country's own population but also against the population of other States. In answer to the question whether, in the first case, the other States should resort to countermeasures not involving the use of armed force or rely on collective mechanisms, it was said that recourse to certain countermeasures (for example, an embargo on arms supplies) was possible under the control of collective mechanisms and that the question of humanitarian intervention involving the use of armed force deserved careful consideration. In regard to the second case (genocide perpetrated against the country's own population and against the population of other States), the question was raised whether the injured States could envisage humanitarian intervention, namely the use of armed force. The Commission was invited to reflect on those questions; otherwise, it would leave States at complete liberty to invoke the still vague concept of humanitarian intervention.

(iii) The punitive implications of the concept of crime

66. Some members stressed that, while the notions of fault and punishment had no place in the regime of responsibility for ordinary breaches of international law, the same was not true in the case of crimes. Reference was made in this connection to the measures taken against the Axis Powers after the Second World War, as well as the "political sanctions" (territorial transfer, military occupation, sequestration or confiscation of assets, armaments control, population transfers, dismantling of industries, demilitarization, etc.) enumerated, although not elaborated upon, by the Special Rapporteur in his fifth report.

67. Other members pointed out that punishment was not lex lata and that the regime imposed by the victors on the vanquished in 1945 had been ruled out by the

Charter for the future, as demonstrated by the inclusion of the reservation contained in Article 107. They strongly objected to the idea that a coalition of victorious Powers might unilaterally and arbitrarily, at their political discretion, annex parts of the territory of an aggressor State and expel its population, in violation of the basic principles of humanitarian law and human rights and of the instruments which prohibited territorial acquisition by force, even as a result of the exercise of the right of self-defence. It was suggested in this context to include in the draft an express prohibition of punitive consequences even in the case of crimes threatening the territorial integrity of States. In support of this approach, the remark was made that, if retribution and revenge were the sole objectives, tension would only be perpetuated and that, while the victim was admittedly entitled to reparation and satisfaction, the objective of reconciliation should not be sacrificed on that account. There was also insistence on the need to avoid alienating the accused State which would, together with its population, continue to be part of the international society.

68. The question of the guilt and liability of the population was generally viewed as a particularly difficult one and a warning was uttered against simplistic answers that would disregard the multiplicity of relations existing within a given State or among States in general. Reference was made in this context to genocide, the primary victim of which was the population of the State which perpetrated it.

69. While some members agreed with the Special Rapporteur that the population of a criminal State might not be entirely innocent, most others struck a note of caution in this respect. It was remarked that the temptation was great to make the people which had applauded the crime committed suffer the consequences of its behaviour, but it must not be forgotten that public opinion was easily hoodwinked not only in countries under a despotic regime but even in democratic countries. Several members also observed that punitive measures could easily affect innocent people, women and children, and even those members of the society in question who had, individually or collectively, been opposed to the crime; and that sanctions against a State were lawful only if they were taken in respect for the rights of the people concerned in accordance with a strict procedure, and if some limits

were placed on the undoubtedly inevitable acknowledgement of a certain degree of culpability.

70. Several members stressed that a balance must be found. Attention was drawn in this context to Chapter VII of the Charter, which perhaps provided the beginnings of an answer, since it required consideration to be given to the economic and other repercussions on other States and populations of sanctions decided by the Security Council, and safeguards to be provided against their consequences having a disproportionate effect on populations.

71. Attention was also drawn to the possibility of recourse to measures which, although constituting a punishment, would not affect the population of the State concerned, for example the dismantling of arms factories and prohibition of the manufacture of certain armaments, or again measures designed to protect the population, for example placing the State concerned under international control through a decision either of the victor States acting in self-defence or of a body having international jurisdiction.

72. Several members took the view that the solution to the problem lay in the prosecution and punishment of responsible leaders and officials. In this connection, however, the remark was made that the suggestion that the prosecution of individuals might be a form of aggravated countermeasures was wholly inadmissible on the grounds of due process as the guilt or innocence of an individual was distinct from that of the State and had to be judged independently.

(iv) The role of the United Nations in determining the existence and the consequences of a crime

73. Some members observed that the Organization was the most convincing expression of the "organized international community" and, the normal instrument for reacting to crimes. Others pointed out that the Charter regime provided only a fragmentary response to the problem under discussion and that, notwithstanding its principles and purposes, the United Nations was not a supra State endowed, on a higher plane, with powers comparable to those of a State at the national level; nor could it exercise the full panoply of powers of a nation State or impose sanctions for breaches of the law.

74. While there was a view that the Commission might well consider recommending a review of the Charter and of the Statute of the International Court of Justice

as well as a number of other institutional innovations that would prove necessary to implement certain ground rules applicable to international crimes of States, the prevailing opinion was that the Commission should refrain from taking such a course of action, bearing in mind that its task was to codify and progressively develop international law and that it did not have the power to confer a new jurisdiction upon the United Nations and its bodies.

75. As regards the role of the Security Council, the members who addressed the issue generally distinguished between the category of internationally wrongful acts referred to in paragraph 3 (a) of article 19 (including aggression), and the categories listed in paragraphs 3 (b), (c) and (d) of the same article.

76. As regards aggression, comment focused on the role of the Council in
(1) determining the existence of an internationally wrongful act and
(2) prescribing the corresponding consequences.

77. On the first point, the view was expressed that nothing precluded the Security Council from determining the existence of a crime under the powers conferred on it by the Charter, provided the alleged act was one of those mentioned in Article 39 of the Charter. In the words of one member, there was no question that the Council had the power to determine that an act of aggression had been committed; it followed that, if aggression was recognized as a crime, the Council was empowered to determine that a crime had been committed.

78. A note of caution was however struck in this respect. Several members stressed that the Security Council had neither the constitutional function nor the technical means to determine the commission of a crime. The Council, it was stated, was a political body endowed with political powers, which could not without acting ultra vires decide on the judicial responsibility of a State. Attention was also drawn in this context to the absence in the Charter regime of a control mechanism to determine if and when the Council overstepped and abused its authority.

79. With reference to those concerns, some members drew attention to the system of checks and balances aimed at minimizing the risk that the Council might adopt a patently illegal decision. It was furthermore suggested that any determination of aggression by the Council be open to challenge under a rule to be inserted in article 19 by virtue of which the State characterized as an aggressor could refer

the matter to a judicial body, perhaps the International Court of Justice. Another suggestion was that the Council's determination should take the form of a presumption rather than a definitive conclusion.

80. As regards the second point mentioned in paragraph 76 above, the view was expressed that the Council was empowered to decide on the sanctions to be imposed on those responsible within the framework of the powers conferred on it under Chapter VII of the Charter. It was said in this connection that the Council would have a central role to play in connection with measures that could undermine the independence, sovereignty or territorial integrity of the State which committed the crime and, in particular, of armed action, and that its intervention would be a condition for the lifting of the prohibitions laid down in article 14. The view was also expressed that although the Security Council had never yet taken punitive measures, the reason being that it had never yet decided that a crime had been committed or even determined that an aggression had occurred, nevertheless the Charter enabled it to conclude, once a crime of aggression had been determined, that collective sanctions should embrace punitive measures which were appropriate for a crime.

81. Other members emphasized that the Council was not intended to operate as a sanctions mechanism. They observed that the Council had a policing function geared towards the maintenance of international peace and security, that it had rarely adopted mandatory sanctions and that the case of Iraq in which the Council had imposed obligations on Member States that might affect their conduct was a special one from which one could not draw the general conclusion that the United Nations could prescribe consequences for the international crimes enumerated in article 19. Concern was expressed in this context that, although punitive measures were presented as a thing of the past which had no place in a modern codification of international law, the world should witness a tendency in the practice of the Security Council not to abandon punitive measures but to disguise them as <u>restitutio</u> or guarantees of non-repetition. The Commission was invited to ask itself whether, at a time when severe measures were taken on the basis of the "organic reaction" of the world community against a State committing a crime, and when it was claimed that a reaction of that kind lay outside the responsibility regime, it ought to accept the unfettered exercise of power to

conceal a severe punitive intent in the regime of the maintenance of international peace and security.

82. As regards the categories of internationally wrongful acts referred to in paragraphs 3 (b), (c) and (d) of article 19, the remark was made that the Security Council could be presumed to have the competence to determine that they had been committed where they entailed a breach of the peace within the meaning of Article 39 of the Charter. Some members favoured a broad interpretation of the powers of the Council under Chapter VII or envisaged the possibility that the Council's competence would cover all the breaches which might be contemplated in article 19 in a revised form.

83. Concern was however expressed that any attempt to bring crimes other than aggression within the category of the maintenance of international peace and security would give rise to dangerous juxtapositions, with the attendant blurring of distinctions, debatable conclusions and questioning of the powers of the Security Council. The remark was made in this context that the current trend towards a considerable broadening of the concept of threat to the peace had its limits and that an exaggerated extension of that concept was probably not very sound.

84. Concern was also expressed that the Security Council was very much influenced by its procedure (and, in particular, by the right of veto which conferred permanent immunity on at least five countries and on a few others) and consequently it could neither create a court nor effectively recognize responsibility for crime. Reference was made in this context to the current developments concerning the permanent membership of the Council and the remark was made that a more balanced representation of various regional groups, served by a more equitable distribution of permanent seats, would enhance the Security Council's credibility in identifying certain international crimes and in authorizing collective punitive or self-defence operations on behalf of the international community.

85. Several members referred to the question raised by the Special Rapporteur in his fifth report whether Security Council resolutions 687 (1991), 748 (1992) and 808 (1993) reflected an evolution in the Security Council's competence.

86. The members who commented on this question generally answered it in the negative. It was stated in particular that each of the above-mentioned resolutions dealt with the maintenance of international peace and security, i.e. the area of responsibility of the Security Council. Attention was further drawn to the fact that whether there had been an evolution in the competence of the Security Council was a question of interpretation of the Charter which fell outside the Commission's mandate.

87. Some members insisted on the distinction to be made between the powers of the Security Council and the rules on State responsibility. While the remark was made that the Council did not have the power to invent new laws and was bound to apply the law within the limits of its mandate, it was also emphasized that the Council's powers were in no way conditioned by the rules under discussion. Support was expressed for the inclusion in the draft articles of a clause along the lines of article 4 of Part Two which would reserve the competence of the United Nations or certain regional bodies in the event of a threat to peace or aggression and prevent any broadening of the exceptions to the prohibition of the use of force. Objections were however raised against any formula which would subordinate the applicability of the articles on State responsibility to the decisions of the Council or divest them of any meaning in certain situations at the discretion of a political body.

88. Several members expressed the opinion that the General Assembly had a role to play in the case of crime since, it was said, it was the centre of gravity of the conscience of the international community. It was pointed out that, on the basis of Articles 10 and 34 of the Charter, the Assembly could take a decision on just about everything and made the most of that opportunity and that, although, in regard to a reaction to a wrongful act as in all others, it had no power of decision, it was in a position, through recommendations, to allow and authorize conduct that could have a considerable impact in matters pertaining to the issue under consideration. Reference was made in this context to the many resolutions in which the General Assembly had declared that peoples subjected to colonial or foreign domination - a crime under article 19, paragraph 3 - could use all means to combat such domination.

89. Emphasis was however placed on the limits to the role of the Assembly in the area under consideration, bearing in mind that the determination of the consequences of a crime was primarily an act of a judicial nature. Several members furthermore warned against engaging within the Commission in a debate on the powers of United Nations organs or on the scope of Article 51. It was pointed out that it was the Security Council that might order the use of armed force under Article 42 of the Charter and that the right of self-defence was subject to strict conditions under Article 51. Strong doubts were expressed as to the possibility, in the present political climate, to legally adapt the existing powers of United Nations organs to the tasks flowing from article 19 of Part One, the more so as such an adaptation would involve an examination of primary rules and went beyond the Commission's mandate. While recognizing that it was not for the Commission to fill the gaps in the Charter or to review it, some members suggested that means should be provided for taking full advantage of the powers and functions of United Nations organs instead of relying solely on Chapter VII and on the Security Council, to which systematic reference was actually a facile solution, as one member put it.

90. As regards the International Court of Justice, several members stressed that an ultimate determination as to whether a crime had been committed could only be entrusted to a judicial organ. It was recalled in this context that the Court could pronounce on the existence of any breach of international law including the existence of a crime and draw the necessary conclusions. The formula adopted in the 1969 Convention on the Law of Treaties was viewed as the only acceptable substitute for the determination by the State itself of the commission of a crime.

91. Attention was however drawn to the limits to the jurisdiction of the Court, because of the consensual basis of its competence. The conferment of compulsory jurisdiction on the Court in the cases under consideration would, it was stated, be tantamount to a real revolution in international law.

(v) Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness

92. The remark was made that, having regard to the definition contained in article 19, paragraph 2, and to the erga omnes nature of the obligation breached in the case of a crime, and bearing in mind article 29, paragraph 2, it was

already established that consent could not do away with the wrongfulness of a crime. As regards state of necessity, attention was drawn to paragraph 2 (a) of article 33, which likewise made an exception in the case of a peremptory norm of general international law, so that the problem was already settled. As to force majeure dealt with in article 31, the remark was made that it could hardly apply in the case of crimes since a crime involved premeditation.

93. According to one view, the above analysis confirmed that there was no point to the crime/delict distinction. According to another view, the non-applicability of circumstances precluding wrongfulness was part of the special legal regime applicable to crimes.

(vi) The general obligation of non-recognition of the consequences of a crime

94. Some members observed that the normal illustration of this obligation related to the acquisition of territory. Several issues were raised in this connection. It was first pointed out that by providing for an obligation not to recognize as legal any territorial acquisition resulting from the use of force, one returned to the primary rule prohibiting the use of force against territorial integrity and against the rights of peoples and entered the realm of primary rules, in disregard of the Commission's decision to deal only in the draft on State responsibility with "secondary rules". The remark was also made that, in State practice, acquisition of territory resulting from the use of force need not be characterized as a State crime: the duty not to recognize such acquisition was a consequence not only of crimes but also of delicts and acquisition of territory resulting from the use of force in exercise of self-defence, although not a crime, was still a wrongful act to which the duty of non-recognition should apply. A further issue which was mentioned in this context was that most criminal conduct was criminal by reason of its consequences in fact and that facts had to be recognized, the question being whether one recognized legal consequences as well.

95. The members who addressed the issue agreed that the general obligation of non-recognition of the consequences of crimes of aggression arose from a decision of the Security Council. One of them however took the view that the obligation in question might also be triggered by an authoritative statement of the General Assembly.

(vii) The general obligation not to aid a "criminal" State

96. The remark was made that this matter pertained to complicity and was one of primary law. One member, while agreeing that the passive duty of non-recognition was confined to certain classes of wrongful acts when the validity of the measure taken was at issue, pointed out that the duty of non-assistance to the offending State, which, in his opinion, covered delicts as well as crimes, was not confined to acts where validity was at issue. A further observation was that there was no obligation de lege lata or de lege ferenda to render aid to the victim of a crime.

(c) The courses of action open to the Commission

97. According to one body of opinion, the Commission, despite the difficulties to which the concept of State crimes gave rise, should pursue its task unflinchingly and concentrate on defining the consequences of the most serious internationally wrongful acts, which inevitably differed, at both the substantive and the instrumental levels, from those of delicts. It was stressed that a thorough study of the consequences of crimes, maintaining the balance between codification and progressive development, would enable the Commission to decide on second reading, with a full understanding of the matter, as to the validity of the dichotomy established at the beginning. The Commission was therefore invited to devote itself as a matter of priority to instituting the special regime of responsibility for crimes, in accordance with its mandate, which had been renewed regularly by the General Assembly since 1976. Confidence was expressed that, while there were other possible alternatives, 19/ the most likely scenario was that the Commission would identify appreciable differences in the consequences of the two categories of internationally wrongful acts, based on acceptance of article 19. It was suggested that, in order to facilitate its task, the Commission should establish cooperation with outside experts, bearing in mind that any progress accomplished on this subject might help to strengthen the

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19/ The Commission could, it was stated, defer the issue to second reading, at which stage it would either successfully deal with the matter or decide to expressly exclude from the scope of the draft the most serious internationally wrongful acts or, alternatively, reach the conclusion that crimes did not entail consequences different from those of delicts, the question then arising whether article 19 should be eliminated despite its ideological and symbolic weight.

primacy of law in international relations, prevent conflicts and facilitate their settlement.

98. According to another view, the Commission would be unwise to embark on the formulation of detailed provisions concerning the consequences of crimes, given the very real risk that it might ultimately fail in its efforts to elaborate a workable definition of "State crime" and identify only trivial consequences, harmful to other more realistic aspects of the law and likely to enhance the threat of peace and security or to erode the viability of the concept of erga omnes violations in general. The remark was also made that any effort to elaborate the consequences that might flow from State crimes would depart from the basic premise that the draft was to be confined to secondary rules, confront the Commission with implementation problems, trespass on the Charter regime and be a distraction from the important task of developing a satisfactory regime dealing with general issues of State responsibility.

99. While warning against any hasty reconsideration of article 19, whose adoption was, it was recalled, described by the Commission in the relevant commentary as a "step comparable to that achieved by the explicit recognition of the category of rules of jus cogens in the codification of the law of treaties", several members agreed that it would be impossible for the Commission, within the time-limits it had set itself, to elaborate rules on the consequences of international crimes, having regard to the doubts which existed on the distinction established in article 19 between crimes and delicts and bearing in mind the scarcity of relevant practice and the sensitive character of the issue which touched upon State sovereignty.

100. At the procedural level, it was suggested that the Commission should report the difficulties it faced to the General Assembly and refrain, at the stage of first reading, from presenting articles on the consequences of international crimes, while reserving the opportunity to do so on second reading. The idea that the Commission seek the guidance of the Sixth Committee was however objected to, as was also the suggestion that State crimes form the subject of a separate topic.

101. At the substantive level, various ideas were put forward: the Commission, it was said, might confine itself to noting the existence of a close link between

the material consequences of crimes and the reaction to those consequences of the international community as a whole. Another possible approach which was mentioned was to retain article 19 in an amended form, to include in Part Two a clause saying that the application of the draft articles to cases constituting crimes as defined in article 19 was a matter not dealt with by the draft articles and that those articles were without prejudice to such application, in accordance either with the Charter or with general international law and, finally, to ensure that the rules in Part Two were adapted to deal with State crimes in their manifestation as internationally wrongful acts. A further suggestion was that the draft be confined for the present to the formulation of norms concerning the consequences of aggression, genocide and apartheid.

(d) Conclusions of the Special Rapporteur

102. With reference to the general question whether the article 19 distinction among international delinquencies should be maintained, the Special Rapporteur noted that, for most members, extremely serious breaches of international law called for separate treatment within the framework of the first reading of the project: while some members saw a mere difference of degree in the gravity of international delinquencies, the prevailing opinion was that the dichotomy was based upon a difference in nature. On the other hand there was a view that the draft on State responsibility should not deal with a distinct category of "crimes". The elimination from the draft of any distinction whatsoever was also advocated by some.

103. As regards article 19, the Special Rapporteur observed that according to the majority, the present wording, notwithstanding its defects, should stand, subject to improvement on second reading based on developments in the practice of States and in the literature. He noted that despite some reservations, a fair number of members seemed inclined to maintain the term "crimes", without however, excluding the possibility of finding a better alternative. Others favoured abandoning the term "crime" because of its national criminal law connotations. Some suggested as a substitute a reference to extremely serious violations of jus cogens rules. The Special Rapporteur further observed that while the basic elements of the definition were generally accepted, particularly the reference to the violation by a State of an international obligation of essential importance for the

safeguard of fundamental interests of the international community, the list in paragraph 3 of article 19 was viewed by most speakers as calling for reconsideration or as belonging in the commentary.

104. On the courses of action open to the Commission, the Special Rapporteur noted that a few members had suggested to submit to the General Assembly a first reading text not covering the consequences of crimes, to call the parent body's attention to the doubts expressed by numerous members with regard to the possibility of codifying the matter unless a better definition of crimes was worked out and to defer the decision on the fate of article 19 and the consequences of crimes to the second reading of the draft. He at the same time noted that the majority of members, except of course those totally opposed to the article 19 dichotomy, thought it better for the Commission to explore all possible alternatives in the form of draft articles to be considered if possible by the Drafting Committee at the next session, and to verify the solution at the second reading stage.

105. On the question of who was competent to determine that a crime had been committed in a given case and to implement the applicable regime, the Special Rapporteur pointed out that the debate had brought to light two sets of problems. One problem which some speakers seemed to consider as related to Part Three of the draft was which organ would be competent to settle possible disputes over the existence and attribution of a crime and decide on the legitimacy of the reaction and on the measures called for by the situation. The other problem - surely a Part Two problem - was who could legitimately react, either by claiming compliance with substantive obligation (cessation, reparation, satisfaction, guarantees of non-repetition) or resorting to measures (countermeasures or sanctions).

106. As regards the first problem, the Special Rapporteur remarked that some speakers favoured the establishment of the compulsory jurisdiction of the ICJ perhaps in an additional protocol and that others questioned this solution in view of the reluctance of States to go to the Court for important questions and bearing in mind the voluntary nature of the ICJ's jurisdiction. Many speakers had emphasised the necessity to envisage a verification mechanism of a judicial nature, for such a body to decide on the basis of law.

107. On the second problem, namely who can legitimately react - the Special Rapporteur observed that it was generally recognized (except by the few speakers radically opposed to the idea of a special regime for crimes) that the reaction to a crime (including the very qualification and attribution of a crime) should ideally emanate from an international organ capable of interpreting and implementing the "will" of the international community as a whole such organs to apply, directly or through binding decisions addressed to States, the consequences more or less mandatorily provided for by international law. In this context, he seriously doubted the notion that at the moment there existed such a thing as an organized international community; in his opinion, the claim that the United Nations were the expression of a properly organized international community was highly questionable. In this connection, he noted that there was general agreement that the so-called international community was not endowed at present, and was not likely to be endowed in the near future, with an adequately representative organ entrusted with the function of implementing the regime of crimes and organizing the reaction, subject to an appropriate judicial verification of the legitimacy of characterization and reaction. He further remarked that almost all speakers were agreed that, at least for crimes consisting of aggression or a breach of the peace, a collective reaction system did exist in Chapter VII of the Charter, although it was not conceived for, and not easily adaptable per se, to the implementation of a regime of responsibility.

108. With regard to the de lege lata or de lege ferenda competence of United Nations bodies in the implementation of the reaction to crimes, the Special Rapporteur noted that the majority seemed to share his view, as expressed in his fifth report, 20/ that even for such a crime as aggression, the Council would not qualify as the specifically competent organ for collective reaction either ratione materiae (for example with regard to reparation) or from the viewpoint of legal versus political evaluation criteria or, for that matter, from the viewpoint of an elementary exigency of impartiality, hardly reconcilable with the fact that the so-called veto power would ensure a virtual immunity for some States. He observed that if, on the one hand, the regime to be envisaged for the implementation of the consequences of crimes should in no way put into question

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20/ A/CN.4/453/Add.3, paras. 89 et seq., especially 102-125 and 110-115.

the important Security Council's powers relating to the maintenance (and re-establishment) of peace, it would not be appropriate, on the other hand, to assume that the Security Council could unconditionally be recognized as a competent body for the implementation of the legal regime of international crimes of States, especially with regard to the three categories of crimes other than aggression. He recalled that, in view of these difficulties, some of the speakers had suggested either circumscribing the definition of crimes to the hypotheses contemplated in Chapter VII of the Charter or dealing separately with the crimes related to those hypotheses in order to take better account of the Security Council's possibilities of action with respect to such crimes.

109. The Special Rapporteur emphasized that a number of speakers had warned against interfering with the function of the Security Council, which had a political role aimed at the maintenance of international peace and security and was concerned neither with the prerequisite of the commission of a crime nor with stating the law and sanctioning the author. In particular, no amendment to the Charter seeking to entrust the Council with new functions should be envisaged and the draft should indicate that its provisions relating to crimes were without prejudice to the Charter procedures relating to the maintenance of international peace and security.

110. The Special Rapporteur further observed that, while some were inclined to rely on the Security Council for the sole implementation of the consequences of the crimes corresponding to the hypotheses covered by Chapter VII of the Charter, a more liberal interpretation of the Council's powers had been suggested by other speakers, with a view to encompassing crimes other than those corresponding to Chapter VII hypotheses and that attention had also been drawn to a desirable re-evaluation of the role of the General Assembly as an expression of the "conscience" of the international community as a whole.

111. The Special Rapporteur noted that a majority of the participants in the debate had struck a note of caution as to the possibility of leaving the reaction to a crime in the hands of individual injured States (or small groups of States) and had deemed a collective response to be desirable either from United Nations organs - Security Council or General Assembly (the latter being competent to deal with all the kinds of situations which may involve a crime) - or, according to a

few speakers, other collective bodies to be established. Consultation procedures had also been suggested. He further remarked that a number of speakers had expressed themselves very firmly against leaving any room for unilateral initiatives of States or groups of States, especially for the most severe measures or sanctions in the absence of any manifestations of a "collective will", while others had taken the view that some room for unilateral measures should be left for all States either in case of failure of a timely and effective reaction of the so-called organized international community or to supplement such collective reaction, provided, however, that no armed reaction would be acceptable.

112. Concerning the objective aspects of the consequences of international crimes of States, namely the nature and degree of aggravated consequences, the Special Rapporteur noted, as regards substantive consequences, widespread acceptance of the idea that not all the exceptions envisaged in articles 7 and 10 should apply in the case of crimes: more particularly restitution in kind would only be subjected to the jus cogens and physical impossibility restrictions and satisfaction could include not only heavy "punitive damages" but also measures affecting "internal sovereignty", domestic jurisdiction and the State dignity.

113. As regards instrumental consequences, the Special Rapporteur detected a high degree of agreement with regard to the prohibition, even in the case of crimes, of armed measures, except, of course, for measures taken in individual or collective self-defence or adopted by the Security Council under Chapter VII for situations involving the crime of aggression - which, in his view, seemed to confirm a widespread preference for a differentiated treatment of the crime of aggression as opposed to the other kinds of crimes singled out in article 19.

114. With regard to collective self-defence, the Special Rapporteur remarked that, according to one speaker, the draft should insist on the limits of self-defence and make it clear that a State was entitled to act in collective self-defence only at the request of the attacked State or on the basis of an alliance or regional security treaty. He further observed that except for self-defence, the use of force was generally recognized to be, even in reaction to a crime, the exclusive prerogative of the so-called "organized international community" (and particularly of the Security Council) whose prior authorization

was required for the use of force in cases other than aggression, including genocide or humanitarian intervention.

115. The Special Rapporteur noted that for most speakers, the envisaged "heavier" - but in no case armed - measures should fall short of the degree of intensity of the measures applied by the victorious party against a vanquished State and that, according to one view, any measure attaining a high degree of intensity should be conditional upon a collective decision genuinely representative of the common interest of the acting States, unilateral or small groups' initiatives to be condemned. Such measures included, in the opinion of a number of speakers, the pursuit of the criminal liability of the responsible individuals who operated in key positions of the law-breaking State's structure.

116. The Special Rapporteur pointed out that some members viewed as inadmissible breaches of jus cogens rules in reaction to a crime (like violations of the prohibition of force) and that in the view of a number of them, the measures directed against a State author of a crime could go beyond the mere pursuit of reparation subject to the rule of proportionality. Some speakers had furthermore stressed the necessity of condemning, even in the case of crimes, any measures affecting the territorial integrity of the State or the identity of the people.

117. As regards concerns over the population of the law-breaking State, the Special Rapporteur noted that, although any particularly severe effects for the populations should be carefully avoided, a few speakers saw merit in making the peoples themselves aware of the dangers that could derive for them from attitudes amounting to more or less over "complicity" in the criminal actions of a democratic or non-democratic government or despot.

118. From the above, the Special Rapporteur concluded that, apart from those few speakers who contested as a matter of principle the legal or political propriety of the distinction between delicts and crimes, only one speaker had expressly contested the existence of any differentiation in the consequences between crimes and delicts. He further observed that a certain degree of consensus had emerged in relation to a general obligation - conditional however on a pronouncement of the so-called organized international community - not to recognize as valid in law any situation from which the law-breaking State had derived an advantage as a result of the crime and that some also acknowledged the existence of a general

obligation not to help in any way the law-breaking State to maintain the favourable situation created to its advantage by the crime.

119. Mention had also been made of a general duty of "active solidarity" with the victim State or States, involving an obligation to comply in good faith with the measures decided by the international community, or by States themselves "in concert", in response to an international crime of State.

120. The Special Rapporteur concluded that, although no firm and specific solutions had emerged, the debate had provided sufficient indications to enable him to work out, in time for the next session, proposals relating to the consequences of crimes, in the form of articles or paragraphs of Part Two and Three, which could, once discussed, be referred to the 1995 Drafting Committee. He expressed confidence that together with the completion of the work already in progress on Parts Two and Three, this would allow the Commission to conclude in time the first reading of the draft articles on State responsibility.

(e) Comments on the topic in general

121. Some members referred to the possible inclusion in the draft articles of dispute settlement procedures. Concern was expressed that the establishment of an elaborate dispute settlement regime on the basis of the Special Rapporteur's proposals (A/CN.4/453 and Add.1) might delay the completion of the first reading of the draft. The remark was also made that, given the growing trend of States to reserve themselves the maximum latitude in this respect, the principle of unfettered choice of means should be at the centre of any future mechanism. It was therefore suggested that it should be left to the future diplomatic conference to elaborate provisions which were both progressive and realistic, on the basis, where appropriate, of the precedent provided by the Convention on the Law of Treaties. In this connection, the remark was made that the Commission, while it was duty-bound to be progressive, should not forget that its conclusions were not final and that the results of its work were ultimately examined by States, which obviously had the last say.